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No. 96-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
Petitioners,

v.

DARE COUNTY BOARD OF EDUCATION
Respondent.

On Petition For Writ of Certiorari To
The North Carolina Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF CLARENDON FOUNDATION AND THE FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of this Court, Clarendon Foundation and The Fairness to Land Owners Committee respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; respondents have not, thus necessitating the filing of this motion.

Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant legal issues related to the Constitution and democratic government. The Foundation participates in various forums in cases where the resolution of constitutional issues implicates basic rights, including the rights attendant to the ownership of property. The organization is committed to an ongoing review of the core tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles." George Mason, THE VIRGINIA DECLARATION OF RIGHTS, *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 278 (R. Rutland ed. 1970).

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. The organization represents over 19,000 "mom and pop" members who are private property owners faced with confiscatory federal, state and local land-use laws and regulations involving wetland, endangered species, growth management, etc.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land. It is active in writing and lobbying for balanced, fair and environmentally sensitive federal and state private property rights protection legislation, and is active in educating the public and lawmakers about the difference between conservation and confiscation. Its officers and members have testified numerous times before the United States Congress and state legislatures.

The issue raised by the Petition potentially affects thousands of landowners. Because of the distinct perspective that Clarendon Foundation and FLOC can offer in this case, and because our members have a substantial interest in the outcome of this litigation, our participation should assist the Court in determining that the Petition should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may rely on a federal statute to expand state regulatory authority without express statutory authorization.

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INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out fully in the preceding motion. The motion indicates that petitioners, but not respondent, have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents an important and unsettled question of federal law—namely, whether a state court may undercut the critical division of state and federal authority by presuming that a federal statute can, *without express statutory authority*, expand the state's power of eminent.

We urge the Court to grant *certiorari* for a single reason, if no other. The question presented offers the Court an important occasion to further define the contours of its emerging federalism jurisprudence, as articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Lopez*, 115 S.Ct. 1624 (1995). In particular, this Court is being asked to decide whether "a program of cooperative federalism," *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981), like the Clean Water Act automatically extends state eminent domain power where the statute contains no express authorization to that effect. Given the ubiquity of such programs in federal law, the scope of authority that state courts may properly infer from them should not be left undefined.

REASONS FOR GRANTING THE WRIT

During the past few years this Court has articulated a set of doctrines that has begun to move constitutional law away from a pronounced bias in favor of centralization and toward a more careful approach to the division of authority between state and national governments. This trend is especially noticeable in a recent line of cases: *Gregory v. Ashcroft*, *New York v. United States*, and *United States v. Lopez*.

Gregory v. Ashcroft raised the question whether the Missouri Constitution, which set a retirement age of 70 for "[a]ll judges other than municipal judges," MO. CONST. art. V, § 26, violated the federal Age Discrimination in Employment Act of 1967 (ADEA). 501 U.S. 452, 455 (1991). The Court held that this state constitutional provision did not violate ADEA. *Id.* at 473. From the perspective of the instant case, the most significant aspect of *Gregory* appears in the introductory paragraphs, where the Court defined federalism, identified its benefits, and emphasized its significance as a structural protection of personal liberty. Because these paragraphs concisely express the Court's careful approach to federalism, they are worth reproducing *verbatim*:

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." [*Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)].
>
> . . . .
>
> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. *In the tension between federal and state power lies the promise of liberty.*

Id. at 457-59 (emphasis added).

This careful approach to federalism made a noteworthy appearance in *New York v. United States*, 505 U.S. 144 (1992). At issue was the constitutionality of the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act was held unconstitutional under the Tenth Amendment, because it "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 188. While Congress could directly enact legislation, the Court reasoned, the Constitution gives Congress no authority to direct state legislatures to enact it instead. *See id.* at 178.

The Court likewise underscored that Tenth Amendment acts only indirectly as a limitation on federal authority:

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id. at 156-57. In other words, maintaining federalism in a robust condition depends more directly on the doctrine of enumerated powers than on the indirect reservation of power contained in the Tenth Amendment.

United States v. Lopez, 115 S.Ct. 1624 (1995), presented a recent opportunity for this Court to refine and apply its emerging conception of federalism. In that case the Court held that the Gun-Free School Zones Act of 1990, which made it a federal crime "to possess a firearm," 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), in a school zone, exceeded Congress's authority under the Commerce Clause. Near the end of its opinion the Court refused to expand the line of precedent in which it had given maximum deference to Congress. Instead it insisted on preserving the "distinction between what is truly national and what is truly local." 115 S.Ct. at 1634. Thus, a majority of the Court perceived the existence of that distinction and deliberately left it open for more precise definition in future cases.

In each case—*Gregory*, *New York*, and *Lopez*—the Court has sought "to reconcile post-New Deal concepts of national power with the existence of legal limitations on that power derived from federalism." H. Jefferson Powell, *The Oldest*

Question of Constitutional Law, 79 VA. L. REV. 633, 635 (1993). And in each case the Court's search for reconciliation has led it to mark the outer boundaries that federal law may reach. The case at bar fits squarely into this doctrinal pattern.

In the case below the North Carolina Court of Appeals held, and the North Carolina Supreme Court affirmed, that the Dare County school board had the authority to condemn Petitioners' land to satisfy the wetlands mitigation the regulatory agency required as a condition for issuing a federal permit. Pet. App. 2a; Pet. App. 8b. *Neither federal nor state law, however, expressly authorizes wetlands mitigation or condemnation for wetlands mitigation.* Pet. App. 10-12. This case therefore raises a fundamental, but heretofore unanswered question: Whether, consistent with the enumerated powers set out in Article I and the indirect reservation of authority contained in the Tenth Amendment, a state court may implicitly rely on the Clean Water Act (CWA) to expand state eminent domain authority without express statutory authorization.

This issue offers the Court an opportunity to delineate its evolving conception of federalism from a fresh angle. Much of the law of federalism is defined in terms of limits on

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[1]As this Court acknowledged, the Clean Water Act has survived constitutional attack on Tenth Amendment grounds in the lower courts. *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981). But our arguments and those of the Petitioners are not directed at the constitutionality of the Clean Water Act, *per se*. They are aimed instead at the constitutionality of the North Carolina state courts' application of the Act. Therefore, whatever precedential effect the Court's remarks in *Hodel* may retain, they have no bearing on the issues raised in this case.

congressional authority. This is certainly true of *Gregory*, *New York*, and *Lopez*. One of the most compelling aspects of this case is that *it presents a federalism issue from the other direction*. Here the threat to a healthy balance of authority between state and federal governments is posed by state courts rather than Congress. This Court is being asked to decide whether state courts may invoke a federal statute to expand the state's regulatory authority, when neither Congress nor the state legislature has granted express authority to do so. In the case at bar, the North Carolina state courts inferred eminent domain power for a purpose—*i.e.*, to obtain Petitioners' property in order to mitigate as required by the regulatory agency as a condition for issuance of a federal permit—that is found nowhere in state law or the federal Clean Water Act. Whether state courts can use federal law in this manner is a question with far-reaching implications.

CWA is a "program of cooperative federalism," *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981). Such programs, which require the active participation of both federal and state officials, are ubiquitous in federal law. *See, e.g., id.* at 289 n.30 (identifying federal laws based on cooperative federalism that have withstood constitutional challenge). If the decision below were allowed to go unreviewed, every "program of cooperative federalism," 452 U.S. at 289, and perhaps every federal law applicable to state governments could be used by state courts as authority to expand state regulatory authority in ways that neither Congress nor the state legislature authorized.

Unless this Court grants review, state courts will remain free to misconstrue programs of cooperative federalism as occasions to expand by implication the state's regulatory

authority. This will profoundly unsettle the division of authority between federal and state governments. If states can expand their own authority in reliance on the silences of federal law, then federal law is being used in ways that exceed federal authority under the Constitution. Ensuring a robust federalism depends at times on the willingness of this Court to police the boundary dividing national and local authority. This is no less true when the threat comes from state courts rather than Congress.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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